STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 27, 2011
v	No. 295429 Muskegon Circuit Court
BRIAN DEANGLO SANDERS, Defendant-Appellant.	LC No. 08-057331-FH

Before: O'CONNELL, P.J., and METER and BECKERING, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of possession with intent to deliver more than 50 grams, but less than 450 grams, of cocaine, MCL 333.7401(2)(a)(*iii*). Defendant was sentenced as an habitual offender, fourth offense, MCL 769.12, to 22 to 40 years in prison. We affirm.

On December 11, 2008, Detective Sergeant Andrew Fias, the head of the West Michigan Enforcement Team (WEMET), following a tip from a confidential informant that defendant was going to travel out of Muskegon that day to purchase a substantial quantity of cocaine, directed other detectives to begin surveillance on defendant. Defendant engaged in numerous errand-like activities, including stopping at a known drug house, stopping at several gas stations and a bar, and making several trips to a convenience store. Defendant also appeared at a car wash at the exact same time as a known drug dealer. Defendant then got on the highway and headed toward Grand Rapids; at times, he exceeded the speed limit. Michigan State Police Trooper Casey Trucks pulled defendant over. A patdown of defendant revealed that he had several thousand dollars on his person. Detective Sergeant Fias requested that defendant be kept in the patrol car for an interview. Although defendant was not under arrest, Trooper Trucks handcuffed defendant pursuant to Michigan State Police policy, because there was no barrier between the front seat and backseat of the patrol car. Defendant gave consent to search his vehicle, which uncovered a total of approximately 75 grams of cocaine, as well as a digital scale with defendant's fingerprint on it.

I. MOTION TO SUPPRESS

Defendant argues that the trial court erred by denying his motion to suppress evidence obtained as a result of the stop and search of his vehicle. We review a trial court's findings of fact in a suppression hearing for clear error and its ultimate decision on a motion to suppress de

novo. *People v Hyde*, 285 Mich App 428, 438; 775 NW2d 833 (2009). The stop of defendant's vehicle implicates his right to be free from unreasonable searches and seizures. See *People v Steele*, ___ Mich App ___; ___ NW2d ___ (2011) (Docket No. 299641, issued April 14, 2011), slip op at 3.

> The Fourth Amendment search and seizure restrictions protect citizens against unlawful brief investigative detentions. See *People v James Green*, 260 Mich App 392, 396; 677 NW2d 363 (2004), overruled on other grounds, *People v Anstey*, 476 Mich 436; 719 NW2d 579 (2006). However, in *Terry v Ohio*, 392 US 1, 21, 30-31; 88 S Ct 1868; 20 L Ed 2d 889 (1968), the United States Supreme Court held that the Fourth Amendment permits police to make a brief investigative stop (a "*Terry* stop") and detention of a person if the officer has a reasonable, articulable suspicion that criminal activity is afoot. The police may also make a *Terry* stop and brief detention of a person who is in a motor vehicle if the officer has a reasonable, articulable suspicion that the person is engaged in criminal activity. *People v Oliver*, 464 Mich 184, 192; 627 NW2d 297 (2001).
>
> In determining reasonableness, the court must consider whether the facts known to the officer at the time of the stop would warrant an officer of reasonable precaution to suspect criminal activity. *Terry*, 392 US at 21-22. "The reasonableness of an officer's suspicion is determined case by case on the basis of the totality of all the facts and circumstances." *People v LoCicero (After Remand)*, 453 Mich 496, 501-502; 556 NW2d 498 (1996). "[I]n determining whether the totality of the circumstances provides reasonable suspicion to support an investigatory stop, those circumstances must be viewed 'as understood and interpreted by law enforcement officers, not legal scholars . . . '" *Oliver*, 464 Mich at 192, quoting *People v Nelson*, 443 Mich 626, 632; 505 NW2d 266 (1993). An officer's conclusion must be drawn from reasonable inferences based on the facts in light of his training and experience. *Terry*, 392 US at 27. The United States Supreme Court has said that deference should be given to the experience of law enforcement officers and their assessments of criminal modes and patterns. *United States v Arvizu*, 534 [US] 266, 273; 122 S Ct 744; 151 L Ed 2d 740 (2002); *Oliver*, 464 Mich App 196, 200. [*Steele*, ___ Mich App at ___, slip op at 3-4.]

In this case, it was permissible for the police to conduct a *Terry* stop and briefly detain defendant, who was in a motor vehicle, because they had a reasonable, articulable suspicion that defendant was engaged in criminal activity. See *id*. at 3. "There is no bright line rule to test whether the suspicion giving rise to an investigatory stop was reasonable, articulable, and particular." *Nelson*, 443 Mich at 635. However, "[c]ommon sense and everyday life experiences predominate over uncompromising standards." *Id*. at 635-636. Here, the trial court found that the police received a tip from a reliable confidential informant that defendant, a known drug

dealer,[1] was going to travel out of town to purchase drugs. In the hours leading up to his departure, defendant engaged in numerous errand-like activities, including stopping at a known drug house and appearing at a car wash at the exact same time as another known drug dealer. These findings of fact were supported by the record and were not clearly erroneous. See *Hyde*, 285 Mich App at 438. Considering the totality of the circumstances, and giving deference to Detective Sergeant Fias' experience and his "assessments of criminal modes and patterns[,]"[2] the facts conveyed by Detective Sergeant Fias to Trooper Trucks at the time of the stop "formed a solid basis upon which [the police] had a reasonable suspicion of criminal activity to justify the *Terry* stop." *Steele*, ___ Mich App at ___, slip op p 3-4.

"A person may be detained on reasonable suspicion in an investigatory stop as long as the police are diligently pursuing a means of investigation that is likely to confirm or dispel their suspicions quickly." *People v Dunbar*, 264 Mich App 240, 246; 690 NW2d 476 (2004), overruled in part on other grounds by *People v Jackson*, 483 Mich 271; 769 NW2d 630 (2009). "Here, the police detained defendant in order to ascertain whether he [was] involved in a drug transaction." *Id*. Also, "[t]here was no evidence presented to indicate that defendant was under arrest." *Id*. Indeed, Trooper Trucks specifically told defendant he was not under arrest and explained why defendant was being handcuffed. And this Court has noted that "an officer . . . handcuffing a defendant does not transform a stop into an arrest." *Id*. at 246 n 7.

Defendant also argues that the circumstances surrounding the stop and detention vitiate his consent. "An investigatory stop . . . is not so inherently coercive that it renders involuntary consent given during the stop." *People v Williams*, 472 Mich 308, 318; 696 NW2d 636 (2005). However, "[c]onsent must be freely and voluntarily given in order to be valid," *id*., which presents "a question of fact based on an assessment of the totality of the circumstances," *People v Borchard-Ruhland*, 460 Mich 278, 294; 597 NW2d 1 (1999). "The presence of coercion or duress normally militates against a finding of voluntariness." *Id*. In this case, the record reveals no coercion on the part of Trooper Trucks or duress on the part of defendant at the time he gave consent to search his vehicle. See *People v Acoff*, 220 Mich App 396, 399-400; 559 NW2d 103 (1996) (stating that consent given while in police custody is not necessarily involuntary). In light of the totality of the circumstances, it appears that defendant's consent was freely and voluntarily given, and the trial court did not clearly err in making that finding.

In sum, the trial court properly denied defendant's motion to suppress because the stop of defendant's vehicle was justified where, considering the totality of the circumstances, the police had a reasonable suspicion that criminal activity was afoot, and the search of defendant's vehicle was justified where defendant provided valid consent.

---

[1] WEMET had been investigating defendant for a two- to three-month period prior to the incident in question and had made purchases of cocaine and crack cocaine from him through a confidential source, including in early December 2008.

[2] Detective Sergeant Fias observed that defendant's conduct was consistent with a drug dealer who is either picking up money from houses that he had previously supplied or dropping off drugs for sale.

II. TESTIMONY OF DETECTIVE SERGEANT FIAS

Defendant argues that the trial court abused its discretion by permitting Detective Sergeant Fias to testify after the prosecution failed to provide the information required by MCR 6.201(A)(3), and failing to provide an effective remedy for the discovery violation. "A trial court's decision regarding discovery is reviewed for [an] abuse of discretion." *People v Phillips*, 468 Mich 583, 587; 663 NW2d 463 (2003). MCR 6.201(A)(3) provides that "a party upon request must provide all other parties . . . the curriculum vitae of an expert the party may call at trial and either a report by the expert or a written description of the substance of the proposed testimony of the expert, the expert's opinion, and the underlying basis of that opinion." It is undisputed that the prosecution did not provide defendant with Detective Sergeant Fias' resumé or a report or written description of the substance of his proposed testimony. However, MCR 6.201(J) provides:

> If a party fails to comply with this rule, the court, in its discretion, may order the party to provide the discovery or permit the inspection of materials not previously disclosed, grant a continuance, prohibit the party from introducing in evidence the material not disclosed, or enter such other order as it deems just under the circumstances. Parties are encouraged to bring questions of noncompliance before the court at the earliest opportunity. Willful violation by counsel of an applicable discovery rule or an order issued pursuant thereto may subject counsel to appropriate sanctions by the court. An order of the court under this section is reviewable only for abuse of discretion.

Here, the trial court overruled defendant's objection regarding the violation of MCR 6.201(A)(3), and proposed a remedy under MCR 6.201(J) of permitting defense counsel an opportunity to interview Detective Sergeant Fias before he was called as a witness.

"When determining the appropriate remedy for discovery violations, the trial court must balance the interests of the courts, the public, and the parties in light of all the relevant circumstances, including the reasons for noncompliance." *People v Banks*, 249 Mich App 247, 252; 642 NW2d 351 (2002). The party challenging the decision must show that the violation caused actual prejudice. *People v Greenfield (On Reconsideration)*, 271 Mich App 442, 454 n 10; 722 NW2d 254 (2006). In this case, defendant was apprised of Detective Sergeant Fias' qualifications at the hearing on defendant's motion to suppress. While Detective Sergeant Fias did not prepare a report for the purpose of testifying as an expert witness, defendant was provided with a copy of the detective's police report. Moreover, defendant conducted voir dire of Detective Sergeant Fias before he was qualified as an expert in illegal trafficking of narcotics. Additionally, the prosecutor's stated reason for noncompliance was that he had never had to provide such notice before in similar cases. In light of all of the relevant circumstances, the trial court's proposed remedy of permitting defense counsel to interview Detective Sergeant Fias before he testified did not constitute an abuse of discretion. Moreover, defendant has not demonstrated that the violation of MCR 6.201(A)(3) caused him actual prejudice. Accordingly, he is not entitled to relief on this issue.

Defendant also argues that the trial court erred in permitting Detective Sergeant Fias to impermissibly buttress his ultimate opinion on a fact that was not established at trial, i.e., that

defendant "met" with a known drug dealer on the date in question. An expert witness may not base his testimony on facts that are not in evidence. MRE 703; *People v Unger*, 278 Mich App 210, 248; 749 NW2d 272 (2008). "An expert witness's opinion is objectionable if it is based on assumptions that do not accord with the established facts." *Unger*, 278 Mich App at 248. Here, the facts established that defendant and another known drug dealer arrived at the car wash at the same time. Detective Sergeant Fias' testimony drawing an inference that the two men were "meeting" there was based on an assumption in accordance with the established facts. Defendant has failed to establish that the trial court's admission of the challenged testimony amounted to plain error affecting his substantial rights. See *People v Kahley*, 277 Mich App 182, 183; 744 NW2d 194 (2007).

Defendant further contends that the trial court erred in permitting Detective Sergeant Fias to testify that, based on the evidence adduced at trial, defendant was a mid-level cocaine trafficker, because it addressed the ultimate issue in the case and amounted to an opinion that defendant was guilty of the charged offense. MRE 704 provides that "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." See *People v Williams (After Remand)*, 198 Mich App 537, 542; 499 NW2d 404 (1993) (stating that "[t]he fact that an expert's opinion may embrace 'an ultimate issue' in the case does not make it inadmissible"). Detective Sergeant Fias' testimony, based on his training and experience, was admissible to aid the jury in determining defendant's intent and his guilt of the charged offense. See *People v Stimage*, 202 Mich App 28, 29-30; 507 NW2d 778 (1993) (holding that a police officer's expert testimony, based on his training and experience, regarding the significance of the quantity of drugs allegedly found in the defendant's possession as it related to the defendant's intent, was admissible to aid the jury in determining the defendant's intent and guilt of the charged offense of possession with intent to deliver less than 50 grams of cocaine). Defendant has failed to establish that the trial court's admission of Detective Sergeant Fias' testimony amounted to plain error affecting his substantial rights. See *Kahley*, 277 Mich App at 183.

III. PROSECUTORIAL MISCONDUCT

Defendant argues that he was denied a fair trial by improper comments made by the prosecutor during closing argument, which suggested that defense counsel was intentionally trying to mislead the jury. The issue is unpreserved and review is for plain error affecting defendant's substantial rights. See *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008).

Generally, claims of prosecutorial misconduct are reviewed to determine whether the defendant was denied a fair and impartial trial. *Id*. In this case, defendant challenges the following italicized rebuttal comments:

> Well, I've only been an assistant prosecutor here in Muskegon County. [*Defense counsel*] *is from Grand Rapids, but it's nice to know that no matter where you go, defense attorneys have the same issue*—don't look right there (indicating). Look everywhere else. The police made a mistake. Prosecutor made a mistake. The crime lab made a mistake. They don't know what they're talking about. *It's the old red herring. You want to distract the hunter from the fox and run the fish*

through the woods. When you don't want somebody to be able to see you, you throw up a smoke screen, and that's what's happened.

"A prosecutor may not suggest that defense counsel is intentionally attempting to mislead the jury." *People v Watson*, 245 Mich App 572, 592; 629 NW2d 411 (2001). A prosecutor's comments, however, "must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial." *Brown*, 279 Mich App at 135. "[A]n otherwise improper remark may not rise to an error requiring reversal when the prosecutor is responding to the defense counsel's argument." *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996).

The prosecutor's rebuttal comments responded to defense counsel's closing argument, which focused primarily on tangential matters and did not address whether the prosecution met its burden of proving the elements of the charged offense. While the prosecutor's comments suggested that defense counsel was trying to distract the jury from the truth and we do not condone them, they were responsive to the content of defense counsel's closing argument, and we cannot conclude that defendant has established plain error affecting his substantial rights.

Defendant also claims that his Sixth Amendment right to counsel was violated by the prosecutor's misconduct in instructing law enforcement to seize notes and other correspondence taken from defendant's jail cell before trial. Because defendant did not object on the basis of prosecutorial misconduct, as framed on appeal, this issue is unpreserved. See *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004) (stating that "[a]n objection based on one ground is usually considered insufficient to preserve an appellate attack based on a different ground"). We review for plain error affecting defendant's substantial rights. See *Brown*, 279 Mich App at 134.

It is well settled that "prisoners have no legitimate expectation of privacy and that the Fourth Amendment's prohibition on unreasonable searches does not apply in prison cells[.]" *Hudson v Palmer*, 468 US 517, 530; 104 S Ct 3194; 82 L Ed 2d 393 (1984). This rule has been extended to "pretrial detainees and inmates confined in jails." *People v Phillips*, 219 Mich App 159, 162; 555 NW2d 741 (1996). However, government intrusion into confidential attorney-client communications may violate a defendant's Sixth Amendment right to the effective assistance of counsel. *Weatherford v Bursey*, 429 US 545; 97 S Ct 837; 51 L Ed 2d 30 (1977). The existence of a Sixth Amendment violation "depends on whether the intrusions were purposeful and whether the prosecution, either directly or indirectly, obtained evidence or learned of defense strategy from the intrusions." *Arizona v Pecard*, 196 Ariz 371, 377; 998 P2d 453 (1999).

Although the search of defendant's cell was intentional, the purpose behind the search was to find evidence that he violated MCL 333.7401(2)(a)(*iii*), not to intercept attorney-client communications. Further, the prosecutor specifically instructed law enforcement not to touch any legal correspondence, and the record does not reveal that the prosecutor obtained evidence of defense strategy or learned of defense strategy from any confidential attorney-client

communications.[3] Because the search of defendant's jail cell was legal and the prosecutor did not impermissibly intrude into confidential attorney-client communications, no prosecutorial misconduct occurred. Defendant has failed to demonstrate plain error affecting his substantial rights.

IV. MRE 404(B) EVIDENCE

Defendant argues that the trial court erred in admitting other-acts evidence, the admission of which he did not object to at trial. We review unpreserved challenges to other-acts evidence for plain error affecting substantial rights. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004). At trial, the prosecutor introduced evidence of two instances of defendant's prior involvement with drugs: in 1995, four baggies of suspected cocaine weighing 11.3 grams were found in defendant's vehicle; and in 2004, a search warrant executed at defendant's residence uncovered 5.4 pounds of suspected cocaine in a vehicle belonging to defendant's wife.

Under MRE 404(b)(1), the proponent of the other-acts evidence must demonstrate that: (1) the evidence is for a proper purpose, (2) the evidence is relevant to an issue of fact that is of consequence at trial, and (3) under MRE 403, the danger of unfair prejudice does not substantially outweigh the probative value of the evidence. *People v Steele*, 283 Mich App 472, 479; 769 NW2d 256 (2009).

> It is well established in Michigan that all elements of a criminal offense are "in issue" when a defendant enters a plea of not guilty. *People v Mills*, 450 Mich 61, 69; 537 NW2d 909 (1995). Because the prosecution must carry the burden of proving every element beyond a reasonable doubt, regardless of whether the defendant specifically disputes or offers to stipulate [to] any of the elements, the elements of the offense are always "in issue" and, thus, material. See *Old Chief, supra*. [*People v Crawford*, 458 Mich 376, 389; 582 NW2d 785 (1998).]

In order to establish that defendant violated MCL 333.7401(2)(a)(*iii*), the prosecution was obligated to prove, inter alia, that defendant knowingly possessed cocaine and that he did so with the specific intent of distributing it. Consequently, knowledge and intent were "in issue." See *Crawford*, 458 Mich at 389. Detective Sergeant Fias testified that defendant denied having knowledge of any illegal narcotics or a scale when such items were found in his vehicle, and claimed that he had loaned the car to his uncle the day before. The prosecution sought to introduce the challenged evidence to show defendant's knowledge and intent. The reasons stated were proper because they do not involve inadmissible character or propensity evidence, and MRE 404(b)(1) specifically provides for them. Moreover, the evidence was relevant to an issue of fact of consequence. "The more often a defendant acts in a particular manner, the less likely it is that the defendant acted accidentally or innocently," and "conversely, the more likely it is that

[3] Defendant's issue on appeal pertains to the prosecutor's conduct in ordering a search of defendant's cell. He does not contend that any documents introduced into evidence at trial were legal communications.

the defendant's act is intentional." *People v McGhee*, 268 Mich App 600, 611; 709 NW2d 595 (2005). "Where other-acts evidence is offered to show intent, the acts must only be of the same general category to be relevant." *Id*. The evidence demonstrated that defendant possessed a significant quantity of drugs on two separate occasions. "The quantities of drugs uncovered in both searches indicated an intent to distribute." *Id*. Additionally, although 13 years had passed between the first incident and the crime at issue, and four years had passed between the second incident and the crime at issue, those time gaps are "insufficient to dispel the probative value" of the evidence. *Id*. Evidence of defendant's similar acts established an intermediate inference, other than the improper inference of character, which was probative of the ultimate issue in the case, specifically, whether defendant knowingly possessed and intended to deliver the cocaine.

Finally, there was no danger of undue prejudice substantially outweighing the probative value of the challenged evidence. See *id*. Only unfairly prejudicial evidence should be excluded. *Id*. at 613-614. "Unfair prejudice exists when there is a tendency that evidence with little probative value will be given too much weight by the jury." *Id*. at 614. Here, although the potential for prejudice existed, the evidence was highly probative in showing that defendant knowingly possessed and intended to deliver the cocaine. Under these circumstances, the danger of unfair prejudice did not substantially outweigh the probative value of the evidence. Moreover, any undue prejudice was offset by a cautionary instruction given to the jury by the trial court. Defendant has failed to demonstrate plain error affecting his substantial rights.

V. CUMULATIVE EFFECT OF ANY ERRORS

Finally, defendant argues that he was deprived of due process by the cumulative effect of the claimed errors. "[I]n order to reverse on the basis of cumulative error, 'the effect of the errors must [be] seriously prejudicial in order to warrant a finding that defendant was denied a fair trial.'" *People v Ackerman*, 257 Mich App 434, 454; 669 NW2d 818 (2003), quoting *People v Knapp*, 244 Mich App 361, 388; 624 NW2d 227 (2001). "The cumulative effect of several minor errors may warrant reversal where the individual errors would not." *Id*. In this case, there were no errors unfairly prejudicial to defendant. Accordingly, "[t]here are no errors that can aggregate to deny defendant a fair trial." *Id*.

Affirmed.

/s/ Peter D. O'Connell
/s/ Patrick M. Meter
/s/ Jane M. Beckering